JANET T. MILLS
ATTORNEY GENERAL

TEL: (207) 626-8800
TTY USERS CALL MAINE RELAY 711

STATE OF MAINE
OFFICE OF THE ATTORNEY GENERAL
6 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0006

REGIONAL OFFICES
84 HARLOW ST. 2ND FLOOR
BANGOR, MAINE 04401
TEL: (207) 941-3070
FAX: (207) 941-3075

415 CONGRESS ST., STE. 301
PORTLAND, MAINE 04101
TEL: (207) 822-0260
FAX: (207) 822-0259

14 ACCESS HIGHWAY, STE. 1
CARIBOU, MAINE 04736
TEL: (207) 496-3792
FAX: (207) 496-3291

May 12, 2015

Hon. David Burns, Chair
Hon. Barry Hobbins, Chair
Joint Standing Committee on the Judiciary
Room 438, State House
Augusta, Maine 04333

Re: **L.D. 268, *An Act Regarding the Penobscot Nation's and Passamaquoddy Tribe's Authority To Exercise Jurisdiction under the Federal Tribal Law and Order Act of 2010 and the Federal Violence Against Women Reauthorization Act of 2013***

Dear Senator Burns and Representative Hobbins:

Please accept these written comments in opposition to LD 268, *An Act Regarding the Penobscot Nation's and Passamaquoddy Tribe's Authority To Exercise Jurisdiction under the Federal Tribal Law and Order Act of 2010 and the Federal Violence Against Women Reauthorization Act of 2013.*

Part A of L.D. 268 would amend 30 MRSA §6206, sub-§3 by striking language providing for exclusive state jurisdiction over violations of tribal ordinances by persons not members of either tribe or nation and adding a new sentence giving the tribe or nation jurisdiction over those violations and violators:

> ~~The State shall have exclusive jurisdiction over violations of tribal ordinances by persons not members of either tribe or nation.~~The tribe and the nation each has jurisdiction within its respective territory over a person who is not a member of either tribe or nation in accord with and to the extent authorized by federal law.

Section 6206 is a central provision of the state settlement act. Entitled "Powers and duties of the Indian tribes within their respective Indian territories," it establishes the governmental relationship between the tribes and the state. Within this framework, the tribes are the functional equivalent of municipalities (though not identical to municipalities) as set out in section 6206(1). In critical part section 6206(1) provides that the Passamaquoddy Tribe and the Penobscot Nation:

> shall have, exercise and enjoy all the rights, privileges, powers and immunities, including, but *without limitation, the power to enact ordinances* and collect taxes, and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State.

30 M.R.S. § 6206(1) (emphasis added).

Subsection 3 of section 6206 specifically addresses the allocation of jurisdiction between the state and the tribes over violations of *tribal ordinances*. This is not one of the sections of the settlement act, sections 6209-A and 6209-B, which address the jurisdiction of the Penobscot and Passamaquoddy tribal courts over crimes and other matters. Part B of the bill would amend section 6209-B, "Jurisdiction of the Penobscot Tribal Court." Interestingly, it does not contain a corresponding provision for the Passamaquoddy Tribal Court whose jurisdiction is set out in section 6209-A.

The bill removes the sentence confirming state court jurisdiction over violations of tribal ordinances by non-tribal members and it adds a sentence which appears to import federal law generally: "The tribe and the nation each has jurisdiction within its respective territory over a person who is not a member of either tribe or nation in accord with and to the extent authorized by federal law." It is unclear what the bill refers to as "federal law," and this is an odd place to reference federal law, especially since only one of the tribal courts is specifically addressed in the bill.

It may be what is meant by "federal law," is as is reflected in the bill title, the Tribal Law and Order Act of 2010 (TLOA) and the Federal Violence Against Women Reauthorization Act of 2013 (VAWA); however, there may be other federal statutes or even case law regarding tribal court jurisdiction over non-tribal members in other contexts. It is a broad importation of federal law into a section dealing with tribal ordinances and it is uncertain what all the ramifications may be. An individual facing criminal charges in any court ought to have more notice of what law he or she has allegedly violated before a court attempts to exercise jurisdiction over that person.

It is also unclear why the authors of the bill believe that specific federal laws apply in Maine, given the broad provisions of 25 U.S.C. §1735(b) which says that federal legislation enacted after 1980 does not apply to the unique circumstances of the Maine tribes unless that federal legislation specifically says that it does. The federal laws cited in the title to this bill do not do so.

It should be noted that under federal law governing tribal courts there are two

distinctions; non-member and non-Indian. In 1990 the U.S. Supreme Court found that it was unconstitutional for a non-member Indian to be tried in a tribal court. *Duro v. Reina*, 495 U.S. 676 (1990) Congress then passed the so-called "Duro" fix, which was upheld in *United States v. Lara*, 541 U.S. 193 (2004). The procedures followed by tribal courts and the rights of defendants are set out in the federal Indian Civil Rights Act (ICRA).[1] 25 U.S.C. §§ 1301-1304.

> This statute requires tribes to abide by criminal procedure requirements of the Bill of Rights, with a few notable exceptions. First, tribes do not need to provide grand jury indictments. Second, neither are tribes required to provide appointed counsel, except in certain prosecutions authorized by two recent statutes described below. Third, although the statute requires trial by *jury of at least six member*s in all cases involving an offense punishable by imprisonment, *it does not expressly require unanimous jury verdicts*, though such unanimity would be required for conviction by any six-member jury in federal or state court. Fourth, ICRA, unlike the Sixth Amendment, generally does not require an "impartial jury." In the Sixth Amendment context, the Supreme Court has inferred from this term a "fair cross section" requirement that bars federal and state governments from systematically excluding any "distinct" group within the community from jury venires. Tribes, in contrast, have often limited jury service to tribal members or, at least, members of some Indian tribe. Finally, even as to the constitutional rights that ICRA does incorporate, courts have held that the statute does not necessarily impose precisely the same requirements as the U.S. Constitution; the statute, rather, permits variations to account for tribal traditions and circumstances. For example, some tribal courts have applied culturally specific notions of the reasonableness of searches and the adequacy of confrontation rights.

Zachary S. Price, DIVIDING SOVEREIGNTY IN TRIBAL AND TERRITORIAL CRIMINAL JURISDICTION, 113 Colum. L. Rev. 657, 673-674 (2013) (footnotes omitted, emphasis added).

The two recent federal statutes referenced in the above quote are also the statutes referenced in the title of L.D. 268. The author describes them as follows:

> [I]n the Tribal Law and Order Act of 2010 (TLOA), Congress amended ICRA to permit tribes to impose penalties of *up to three years for a single offense and nine years total as a cumulative penalty* for multiple offenses. To exercise this jurisdiction, however, tribes must provide additional due process protections, including the right to appointed counsel. The TLOA, however, does not require

[1] The Maine tribes' courts are governed by that statute as well but their jurisdiction is set out in the state settlement act. And the definitions of crimes and punishments are governed by the laws of the state. See 30 M.R.S. §§ 6209-A(2) and 6209(B)(2).

grand jury indictment, trial before a jury including nonmembers of the tribe, or, more generally, interpretation of ICRA's due process guarantees in a manner identical to corresponding constitutional requirements.

The second recent statute is the Violence Against Women Reauthorization Act of 2013 (VAWA), which "recognized and affirmed" tribes' "inherent power" to exercise criminal jurisdiction over all persons, including non-Indians, who commit certain domestic violence offenses against an Indian victim and bear certain connections to the tribe. To exercise this jurisdiction, tribes must provide not only the TLOA's expanded set of procedural protections, but also "the right to a trial by an impartial jury that is drawn from sources that--(A) reflect a fair cross section of the community; and (B) do not systematically exclude any distinctive group in the community, including non-Indians." In addition, tribes exercising this "special domestic violence criminal jurisdiction" under VAWA must provide "all other rights whose protection is necessary under the Constitution of the United States" in order for the grant of jurisdiction to be constitutional.

The exclusive remedy for tribal violations of ICRA, including its procedural requirements, is federal habeas corpus review "to test the legality of [an individual's] detention by order of an Indian tribe"; there is no direct review of tribal convictions in federal or state court.

*Id.* at 675 (2013) (footnotes omitted, emphasis added).

Perhaps because of these expanded requirements which may be difficult for tribes to accommodate, VAWA, which became effective in March this year, authorized a pilot project to test the implementation of the new federal law. The Penobscot Nation submitted an application to the Department of Justice to participate in the pilot project (it was not selected) and that application provides some insight into the current operation of its tribal court and how it proposes to meet VAWA's requirements. There is no information available relative to the Passamaquoddy Tribal Court. The application, however, discloses no dissatisfaction with current officials or current treatment of domestic violence cases in our state courts.

**Questions**

Maine's Constitution requires a jury of the "usual number and unanimity." Me. Const. art. 1, § 7. The usual number is 12. Those protections extend to all Maine citizens including tribal members who may be prosecuted in state courts for offenses not within the current jurisdiction of their tribal court.

Does the Maine legislature have the authority to waive these Maine constitutional requirements for any of its citizens?

How would a jury be selected? The Penobscot VAWA application indicates that 6 person juries are used and that for VAWA purposes the jury pool would be selected from persons living in Penobscot Tribal Territory. No population figures were supplied and it should be noted that the territory consists geographically of the Penobscot Reservation and some very rural land parcels at a distance, some at a great distance, from the reservation.

Under TLOA, the punishment can be a great as nine years. Where would convicted persons serve those sentences?

What is the need for this legislation? Our district attorney's offices are ready and willing to prosecute cases referred to them by tribal law enforcement officers who are authorized to enforce *all* state laws on their territories regardless of a person's tribal membership or race. In what court a case is brought is clearly laid out in the state settlement act. There is no enforcement vacuum. This is not the situation faced by some tribes in the west who have to rely on U.S. Attorney's offices and lie at great distances from those offices. The Penobscot VAWA application indicates that there is excellent coordination between the district attorney's office and the tribe and that there is no problem with declination of prosecutions.

The Maine legislature has passed statutes since 1980 to further facilitate the relationship between the tribal and state courts and law enforcement. *See*, for example, 4 M.R.S. § 161 (issue of process for arrest and issuing of search warrants), 4 M.R.S. § 1059 (remittance of fines by state courts to the tribes when a tribal law enforcement agency issues the ticket, summons, warrant or made the arrest) and 4 M.R.S. § 4659 (protection from harassment, violation of protective orders issued by tribal court is a Class D crime).

Would it be more prudent to wait until the courts resolve some of the issues in this area? The quoted law review article predicts litigation over these issues and notes that Supreme Court cases:

> "... have opened up profound uncertainties regarding the extent and permissibility of tribes' previously settled authority to prosecute offenses against tribal law without following procedural requirements of the Constitution that would apply in federal or state court. ... this [line] of cases provides the framework within which other courts and governmental actors will need to resolve questions such as those concerning the need for federal executive control of tribal criminal enforcement and the applicability of Bill of Rights guarantees in tribal prosecutions."
>
> "Those questions may well arise with greater urgency soon. ... VAWA, as noted, authorizes tribal criminal jurisdiction over certain non-Indians. As tribes--some of which currently face grave problems of law and order --seek to exercise the jurisdiction conferred by this partial "Oliphant fix," as well as the expanded

sentencing authority under the 2010 TLOA, litigation presenting such questions will likely arise more frequently, and with higher stakes."

*Id.* at 679 (2013)

And a final cautionary note,

"Although Congress has extended many constitutional requirements to tribal criminal proceedings by statute, the Indian Civil Rights Act generally does not fully extend the right to appointed counsel, nor does it ensure that tribal juries include nonmembers of the prosecuting tribe, even if the defendant is a nonmember (though it does require that the jury venire include a fair cross-section of the community in any prosecution of non-Indians under the new Oliphant fix). While the Supreme Court has deemed such procedural departures permissible in prosecutions of tribal members, *it has done so on the theory that tribal members have consented to tribal court jurisdiction by maintaining enrollment in the tribe. The Court thus has left open the question of whether procedural variations from Bill of Rights requirements violate due process in prosecutions of nonmembers."*

*Id.* at 720 -721 (2013) (footnotes omitted, emphasis added).

**Conclusion**

In Maine, the design of the settlement acts and the willingness of the Legislature to pass coordinating legislation create a framework for law enforcement and the courts, both tribal and state, that obviates the need for TLOA and VAWA changes. This unique arrangement ensures that all cases can be prosecuted regardless of the identity of the victim or the perpetrator. Furthermore, the tribes remain free to exercise their special authority to define who, and under what conditions, may reside within their territories.

LD 268 represents a broad departure from the original vision of jurisdiction laid out in the Settlement Acts. There are substantive differences between Maine's laws and constitution and what is being contemplated in LD 268. It is far from clear that a court would find it permissible to subject a non-tribal person in Maine to criminal penalties in a tribal court.

We would be happy to answers any questions about LD 268 that you may have.

Sincerely,

Janet T. Mills
Attorney General